No. 87-2098 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SAMUEL K. SKINNER, SECRETARY OF TRANSPORTATION,
Appellant,

v.

MID-AMERICA PIPELINE COMPANY,
Appellee.

On Appeal from the United States District Court for the Northern District of Oklahoma

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SUPPLEMENTAL BRIEF FOR APPELLEE

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TABLE OF AUTHORITIES

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SUPPLEMENTAL BRIEF FOR APPELLEE

Pursuant to Supreme Court Rule 35.5, Appellee Mid-America Pipeline Company submits this supplemental brief addressing *Mistretta v. United States*, Nos. 87-7028, 87-1904, slip op. (Jan. 18, 1989), announced six days after Mid-America filed its brief on the merits.

The Court in *Mistretta* did not confront a situation in which the assignment of power to the Executive Branch undermined a specific constitutional command requiring the power to be exercised directly by the Legislative Branch.[1] Thus, unlike this case, where Congress' assign-

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[1] *See* Slip op. at 36 ("[t]he text of the Constitution contains no prohibition against the service of active federal judges on inde-

ment of the taxing power to the Executive Branch offends the "words and implications" of the Origination Clause (*Morrison v. Olson*, 108 S. Ct. 2597, 2616 (1988), *quoting Myers v. United States*, 272 U.S. 52, 161 (1926)), *Mistretta* did not involve any deviation from a specific constitutional mandate. *See* Appellee's Brief, Part II. Rather, *Mistretta*'s analysis focused exclusively on the more difficult questions presented when no specific command of the Constitution has been undermined by the law in question and the Court must, therefore, decide the separation of powers question by attributing substance to the Constitution's broad textual assignment of the power faithfully to "execute" the law to one branch, to make law, to another, and to decide cases and controversies, to a third. This issue was discussed in our merits brief, Part III. Application of the factors this Court found decisive in *Mistretta* confirms that, unlike the sentencing guidelines, Congress' effort to assign tax rate-setting power to a federal agency violates the Constitution.

1. *Congress' Attempt to Abdicate Its Constitutional Obligation in Section 7005, By Assigning to Another Branch a Power the Constitution Requires that It Alone Exercise, Threatens to Undermine the Constitutional Allocation of Powers In a Sense More Fundamental Than the Usual Case of Encroachment or Aggrandizement of One Branch at the Expense of Another.* In one important respect, the threat to the constitutional allocation of powers posed by this case differs from that presented in *Mistretta*. Here, we have not so much "the encroachment or aggrandizement of one branch at the expense of the other," (*Mistretta*, slip op. at 20, *quoting Buckley v. Valeo*, 424 U.S. 1, 122 (1976)), as we do the obverse situation—a case of "de-aggrandizement," *i.e.*, legislative

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pendent commissions such as that established by the Act"); *id.* at 49 n.32 ("[t]he textual requirements of Article III that judges shall enjoy tenure and be paid an irreducible compensation . . . are untrammeled by the Act").

abdication.[2] Yet, if anything, Congress' abdication of power in this case presents a greater, and more concrete, constitutional danger than encroachment precisely because it promises to nullify a specific constitutional prescription—that *Congress* make tax law. As Mid-America demonstrated in its brief on the merits (pp. 10-15), in assigning the taxing power to Congress, and in prescribing a specific legislative process to govern its proper exercise, the Framers' intent was to accomplish something far more basic for a government that rested on democratic principles than merely to moderate inter-branch warfare: namely, to ensure that taxing decisions be made by persons immediately accountable to the voters. To allow Congress to abdicate its assigned responsibility for such decisions is to render the Framers' plan ineffectual.

In addition, Congress' attempt to reassign the taxing authority to the Executive presents a danger which the Court in *Mistretta* specifically noted was not posed there —an inappropriate combination of two governmental powers or functions within one Branch.[3] In contrast to

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[2] The danger of legislative abdication (as opposed to aggrandizement) of power is aptly captured by Professor Ely's observation that the basic problem with much contemporary congressional action lies "not in a propensity to make politically controversial decisions without telling us why, but rather in a propensity not to make politically controversial decisions—to leave them instead to others, most often others who are not elected or effectively controlled by those who are." J. Ely, *Democracy and Distrust* 134 (1980).

[3] *See* Slip op. at 29 n.17 ("had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch."); *id.* at 32 ("the 'practical consequences' of locating the Commission within the Judicial Branch pose no threat of . . . uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts.")

the Sentencing Reform Act, Section 7005 has the direct effect of concentrating in the Executive two governmental functions—executing the law and raising revenue to fund the execution of the law—which, by constitutional design and historical practice, have never been combined in a single Branch. Combining wide discretion in the spending of money with the power to determine the means of raising it removes executive agencies still farther from congressional control—and, therefore, from the practical control of the voting population. Congress' political incentive to control federal spending effectively hinges on the fact that increased governmental expenditure ultimately requires Congress to make the decisions about who will pay the cost. That incentive quickly dissipates, however, when agencies are empowered to make both taxing and spending decisions themselves.[4]

2. *The Department of Transportation Does Not Possess the Sort of Institutional Competence Over Matters of Taxation That Justified the Assignment of Quasi-lawmaking Functions to the Sentencing Commission in Mistretta.* In upholding the Sentencing Commission's authority to promulgate sentencing guidelines, the Court in *Mistretta* noted that the assignment of quasi-lawmaking functions to another branch may be appropriate where the Legislative Branch seeks to draw upon another Branch's "special knowledge and expertise." Slip op. at 34. The special competence of one of the other Branches of government in a certain field may create a constitutional predicate for Congress' assignment of substantive authority to that Branch. *See* Appellee's Brief at 38-39. *See also Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825); *United States v. Curtiss-*

[4] To be sure, Congress retains significant control over federal spending through the appropriations process. Practically speaking, however, it is a reality of contemporary American government that "the President and the Executive Branch have become preeminent in the all-important process of planning and programming federal expenditures." L. Tribe, *American Constitutional Law* 257 (2nd ed. 1988).

Wright Export Corp., 299 U.S. 304, 320 (1936). As demonstrated in Mid-America's brief on the merits, however, taxation is a governmental prerogative that always has been "thought of as the *exclusive* constitutional province of [] one Branch." *Mistretta*, slip op. at 29 (emphasis added). Unlike the Judicial Branch's institutional competence to make discretionary judgments in the field of sentencing (*Mistretta*, slip op. at 34)—an area which is and always has been "a peculiarly shared responsibility among the Branches" (*id.* at 29)—taxation is "a legislative function" that "carries [the Executive Branch] far from its customary orbit." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340, 341 (1974). In short, in asking the Secretary of Transportation to select an "appropriate" tax rate to impose upon the pipeline industry, Congress is plainly not "calling upon the accumulated wisdom and experience of [another] Branch in creating policy on a matter uniquely within [its] ken. . . ." *Mistretta*, slip op. at 51.[5]

3. *Congress' Instruction to the Secretary of Transportation in Section 7005 to Set Tax Rates Cannot Meaningfully Be Said to Be the "Execution of the Law."* The Court in *Mistretta* upheld the Sentencing Reform Act for the additional reason that the statute is a classic example of a delegation "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." Slip op. at 11.[6] As such,

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[5] The Executive Branch's claim to expertise allowing it to make rules governing the means of *collecting* a tax would obviously rest on a far firmer foundation than a claim of entitlement to allocate the tax burden by setting the rate.

[6] As the Court explained, "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate." Slip op. at 18.

Mistretta falls within a long line of cases (*see* Appellee's Brief at 43-49) in which the Court has upheld delegations of authority where "[a] practical construction of the Constitution" requires Congress "to invest [another Branch] with large discretion in matters arising out of the execution of statutes. . . ." *Field v. Clark*, 143 U.S. 649, 691 (1892). No such justification is available here. Rather, Section 7005 involves an assignment to the Secretary of Transportation of a single decision—the selection of a formula. This is plainly not a case where Congress has asked a federal agency to oversee or administer a regulatory program involving multiple decisions, all closely related to one another, that requires expert administrative judgment on a case-by-case basis over time. The Secretary of Transportation is not simply "filling up details," but determining the only issue of moment. In short, quite unlike Congress' reliance on an expert sentencing commission to administer the task of promulgating sentencing guidelines for the federal courts, here there is no program faithfully to execute, only an unpopular taxing decision to make.

4. *The "200-Year Tradition of Extrajudicial Service" Relied Upon By the Court in Mistretta To Warrant Judicial Participation in the Sentencing Commission's Activities Stands in Contrast to Congress' Historic Commitment to Making Tax Law Itself.* Finally, in *Mistretta*, the Court noted that a "200-year tradition of extrajudicial service. . . ," (slip op. at 39), provided vital confirmation for the constitutional legitimacy of permitting federal judges to sit on the Commission and to participate in its quasi-legislative mission of promulgating sentencing guidelines. That same 200-year history warrants just the opposite conclusion in this case. As we demonstrated in our initial brief (pp. 16-19), at the same time as Congress has shown its willingness to grant quasi-legislative authority to the Executive Branch in other fields, Congress has carefully refrained from any similar

delegation in matters of taxation. In particular, and despite the otherwise broad grant of authority conferred upon the Secretary of the Treasury to *interpret* revenue laws through the promulgation of regulations, Congress has always taken care to keep to itself the delicate task of allocating the tax burden among the people. Thus, if " 'traditional ways of conducting government . . . give meaning' to the Constitution," (*Mistretta*, slip op. at 39, *quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (concurring opinion)), Congress' historic practice confirms that the setting of tax rates is not properly part of the execution of the law.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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